

10 DARYELLE LAWANNA PRESTON,
11 Plaintiff,
12 v.
13 CITY OF OAKLAND, DEANNA
14 SANTANA,
15 Defendants.

Case No.14-cv-02022-NC

**ANNOTATED JURY
INSTRUCTIONS RE: CLAIMS AND
DAMAGES**

I. Preston's First Amendment Claim Against Santana

A. Section 1983 Claim Against Santana In Individual Capacity—Elements

Preston's claim for violation of her right to First Amendment free speech under 42 U.S.C. § 1983 is made solely against defendant Santana. In order to prevail on her § 1983 claim against Santana, Preston must prove each of the elements by a preponderance of the evidence:

(1) Santana acted under color of law;

(2) Santana's acts deprived Preston of her rights under the United State Constitution as explained in later instructions.

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation.

If you find Preston has proved each of these elements, and if you find that Preston

1 proved all the elements she is required to prove under Instruction V.B., your verdict should
2 be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any one or more
3 of these elements, your verdict should be for Santana.

4 **Authority:** Ninth Circuit Model Instructions (Civil) 9.2

5 **B. First Amendment Retaliation—Elements**

6 As previously explained, Preston has the burden to prove that Santana deprived
7 Preston of particular rights under the United States Constitution. In this case, Preston
8 alleges Santana deprived her of her rights under the First Amendment to the Constitution
9 when Santana terminated Preston in retaliation for Preston's protected speech.

10 Under the First Amendment, a public employee has a qualified right to speak on
11 matters of public concern. In order to prove Santana deprived Preston of this First
12 Amendment right, Preston must prove the following additional elements by a
13 preponderance of the evidence:

14 (1) Preston spoke as a citizen and not as part of her official duties;
15 (2) the speech was on a matter of public concern;
16 (3) Santana took an adverse employment action against the Preston; and
17 (4) Preston's speech was a substantial or motivating factor for the adverse
18 employment action.

19 [I instruct you that Preston's speech was on a matter of public concern, and,
20 therefore, the second element requires no proof.]

21 I also instruct you that Preston's termination was an adverse employment action,
22 and, therefore, the third element requires no proof.

23 **Authority:** Ninth Circuit Model Instructions (Civil): 9.9; 10.4A.1 Comment ("Actions
24 such as firing and demoting are adverse employment actions for purposes of a retaliation
25 claim").

26 I will now give you more details about these elements:

27 As to the first element, a public employee's speech is not protected by the First
28 Amendment when it is made pursuant to the employee's official duties. To determine

1 whether Preston spoke as a private citizen or a public employee, you may consider three
2 factors: (a) whether Preston's speech was made within Preston's chain of command; (b) if
3 Preston's speech reflected broad concerns about corruption or systemic abuse outside her
4 professional duties, then it is more likely private speech; (c) if Preston's speech was made
5 in direct contravention to a supervisor's orders, then it is more likely private speech.

6 **Authority:** *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-75 (9th Cir. 2013).

7 As to the fourth element, a substantial or motivating factor is a significant factor.
8 Preston can demonstrate the fourth element in three ways: (a) proximity in time between
9 the protected speech and her termination; (b) evidence that Santana expressed opposition
10 to Preston's speech, either to Preston or others; or (c) evidence that Santana's proffered
11 explanations for Preston's termination were false and pre-textual.

12 **Authority:** *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003).

13 If Preston proves those four elements by a preponderance of evidence, then Santana
14 may defeat Preston's retaliation claim by proving the following by a preponderance of the
15 evidence:

- 16 (5) Santana had adequate justification for treating Preston differently from other
17 members of the general public; and
- 18 (6) Santana would have terminated Preston even absent the protected speech.

19 On the fifth and sixth elements, Santana may avoid liability for Preston's
20 termination by showing that Santana would have reached the same decision to terminate
21 Preston even in the absence of Preston's protected speech.

22 **Authority:** *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013); *Clairmont v. Sound*
23 *Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011).

24 C. Evidence You May Not Consider

25 Although the parties may present evidence that Preston was acting as a private
26 citizen during the March 6, 2012, Oakland City Council meeting, the Court has already
27 determined that Preston's speech was not private speech. Therefore, you are instructed not
28 to consider this incident in your analysis of Preston's First Amendment claim.

1 **Authority:** Court's Summary Judgment Order, Dkt. No. 99.

2 **II. Preston's California Labor Code Claim Against the City of Oakland**

3 **A. California Labor Code Claim—Elements**

4 Preston claims that the City of Oakland terminated her in retaliation for Preston's
5 disclosure of information and refusal to participate in unlawful acts. In order to establish
6 this claim, Preston must prove all of the following:

- 7 (1) That the City of Oakland was Preston's employer;
- 8 (2) That the City of Oakland believed that Preston:
 - 9 a. Disclosed to Santana that the proposed Rainbow Teen Center report was
racially discriminatory; OR
 - 10 b. Disclosed to Santana, and/or the City Attorney, and/or City
Councilmember Desley Brooks that Fire Chief Reed was bargaining and
entering into union agreements without approval from the City Council;
OR
 - 11 c. Disclosed to the City Council and/or Sandre Swanson that the Service
Employees International Union ("SEIU") had filed a grievance regarding
the non-collection of union dues from temporary part-time employees.
- 12 OR that Preston:
 - 13 a. Refused to include language in the proposed RTC report regarding
Desley Brooks that she believed was racially discriminatory; OR
 - 14 b. Provided information to the City Council on March 6, 2012 regarding
hiring at the Rainbow Teen Center contrary to Santana's order; OR
 - 15 c. Refused to participate in unauthorized bargaining and agreements without
approval from the City Council; OR
 - 16 d. Refused Santana's orders not to disclose to the City Council the
grievance over the City's failure to collect union dues.
- 17 (3) That Preston had reasonable cause to believe any of the above information
18 disclosed or activities refused were violations or non-compliance with the law;

- 1 (4) That the City of Oakland terminated Preston;
- 2 (5) That Preston's disclosure of information and/or refusal to participate in these
- 3 activities was a contributing factor in the City of Oakland's decision to
- 4 discharge Preston;
- 5 (6) That Preston was harmed; and
- 6 (7) That the City of Oakland's conduct was a substantial factor in causing Preston's
- 7 harm.

8 The disclosure of policies that an employee believes to be merely unwise, wasteful,
9 gross misconduct, or the like, is not protected. Instead, Preston must have reasonably
10 believed that the City of Oakland's policies violated federal, or state rules, or regulations.

11 It is not Preston's motivation for her disclosure, but only the content of that
12 disclosure, that determines whether the disclosure is protected. A disclosure is protected
13 even though disclosing the information may be part of Preston's job duties.

14 **Authority:** CACI 2730

15 **B. City of Oakland's Defense**

16 If Preston proves that her disclosure of information or refusal to participate in an
17 unlawful act was a contributing factor to her termination, the City of Oakland is not liable
18 if it proves by clear and convincing evidence that it would have terminated Preston anyway
19 for legitimate, independent reasons.

20 **Authority:** CACI 2731

21 **III. Damages**

22 It is the duty of the Court to instruct you about the measure of damages. The fact
23 that I have instructed you about the proper measure of damages should not be considered
24 as my suggesting which party is entitled to your verdict in this case. Instructions about the
25 measure of damages are given for your guidance only if you find that a damages award is
26 in order. It is for you to determine what damages, if any, have been proved. You must
27 consider the damages for each claim separately.

28 **Authority:** Ninth Circuit Model Instructions (Civil): 9.1

A. First Amendment Claim—Damages

If you find for Preston, you must determine Preston's damages. Preston has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Preston for any injury you find was caused by Santana. You should consider the following:

- (1) The emotional pain and suffering experienced;
- (2) The reasonable value of wages, earnings, earning capacity, salaries, and employment lost to the present time;
- (3) The reasonable value of wages, earnings, earning capacity, salaries, and employment which with reasonable probability will be lost in the future.

The only damages you may award are those that I expressly authorize in my instructions to you.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Authority: Ninth Circuit Model Instructions (Civil): 5.1; 5.2

1. Nominal Damages

The law which applies to this case authorizes an award of nominal damages. If you find for Preston but you find that Preston has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Authority: Ninth Circuit Model Instructions (Civil): 5.6

2. Punitive Damages

If you find for Preston on the First Amendment claim against Santana, you may, but are not required to, award punitive damages against Santana. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

Preston has the burden of proving by a preponderance of the evidence that punitive

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1 damages should be awarded, and, if so, the amount of any such damages.

2 You may award punitive damages only if you find that Santana's conduct that
3 harmed Preston was malicious, oppressive or in reckless disregard of Preston's rights.
4 Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of
5 injuring the plaintiff. Conduct is in reckless disregard of Preston's rights if, under the
6 circumstances, it reflects complete indifference to Preston's safety or rights, or if Santana
7 acts in the face of a perceived risk that its actions will violate Preston's rights under federal
8 law. An act or omission is oppressive if Santana injures or damages or otherwise violates
9 the rights of Preston with unnecessary harshness or severity, such as by the misuse or
10 abuse of authority or power or by the taking advantage of some weakness or disability or
11 misfortune of Preston.

12 If you find that punitive damages are appropriate, you must use reason in setting the
13 amount. Punitive damages, if any, should be in an amount sufficient to fulfill their
14 purposes but should not reflect bias, prejudice or sympathy toward any party. In
15 considering the amount of any punitive damages, consider the degree of reprehensibility of
16 Santana's conduct.

17 Punitive damages may not be awarded against the City of Oakland. Punitive
18 damages may be awarded even if you award Preston only nominal, and not compensatory,
19 damages.

20 **Authority:** Ninth Circuit Model Instructions (Civil): 5.5

21 **B. California Labor Code Claim—Damages**

22 If you decide that Preston has proved her claim against the City of Oakland you also
23 must decide how much money will reasonably compensate Preston for the harm. This
24 compensation is called "damages."

25 The amount of damages must include an award for each item of harm that was
26 caused by the City of Oakland's wrongful conduct, even if the particular harm could not
27 have been anticipated.

28 Preston does not have to prove the exact amount of damages that will provide

1 reasonable compensation for the harm. However, you must not speculate or guess in
2 awarding damages.

3 The following are the specific items of damages claimed by Preston:

4

5 **Authority:** CACI 3900

6 **1. Economic Damage**

7 The following are the specific items of economic damages claimed by Preston:

8

9 To recover damages for past lost earnings, Preston must prove the amount of
10 earnings she has lost to date. To recover damages for future lost earnings, Preston must
11 prove the amount of earnings she will be reasonably certain to lost in the future as a result
12 of this injury.

13 **Authority:** CACI 3903; 3903C

14 **2. Noneconomic Damage- Emotional Distress**

15 No fixed standard exists for deciding the amount of these noneconomic damages.
16 You must use your judgment to decide a reasonable amount based on the evidence and
17 your common sense.

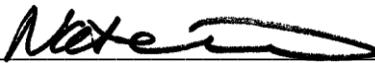
18 **Authority:** CACI 3905A

19

20 **IT IS SO ORDERED.**

21

22 Dated: September 13, 2015


23 NATHANAEL M. COUSINS
24 United States Magistrate Judge